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# State v. Baker Appellant's Brief Dckt. 41590

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 41590
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR 2010-10630
v.	)	
	)	
JEFFERY ALAN BAKER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

HONORABLE PATRICK H OWEN  
District Judge

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State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

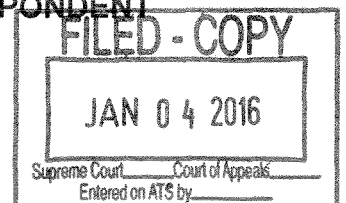
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## STATEMENT OF THE CASE

### Nature of the Case

Jeffery Alan Baker appeals from his judgment of conviction for first degree murder of his eleven-week-old daughter, G.B.. Mr. Baker was found guilty following a jury trial, and the district court imposed a unified sentence of life, with fifteen years fixed.

Mr. Baker now appeals and asserts that the district court erred in failing to provide the jury with a unanimity instruction. The State presented evidence at trial that G.B.'s death was the result of one of three theories: that G.B. died as a result of a blunt force trauma, that she died as the result of being shaken, or she died after being placed in a position that allowed her to slump over and obstruct her airway. Mr. Baker asserts that the State's theory regarding airway obstruction does not meet the required elements of first degree murder by the aggravated battery of a child and, as a result, a unanimity instruction was necessary. In failing to give the obligatory unanimity instruction, the district court denied Mr. Baker's constitutional and statutory rights to a unanimous verdict, to a fair trial, and to due process of law. He asserts that failure to give a unanimity instruction amounted to a violation of his constitutional rights, the error is plain on the face of the record, and there is a reasonable possibility that the error affected the outcome of the trial.

Also, prior to trial, defense counsel moved to exclude a video exhibit that the State proposed to use to illustrate one physician's testimony. The video depicted a highly realistic animation of a baby being violently shaken, and the injuries that would occur as a result of shaking. The district court denied the motion finding that the video was relevant and that its probative value was not outweighed by its prejudicial effect.

Mr. Baker asserts that that the district court erred and abused its discretion when it admitted the exhibit because the video was not relevant to the witness's testimony, and its minimal probative value was substantially outweighed by the danger of unfair prejudice.

Additionally, Mr. Baker asserts that the State committed prosecutorial misconduct which deprived him of a fair trial. The Prosecutor committed misconduct by using an illustrative exhibit for prohibited purposes during closing arguments. Mr. Baker contends that the misconduct committed in his case amounted to a violation of his right to due process and that the error is not harmless.

Further, Mr. Baker asserts that the errors are not harmless or, alternatively, that the errors amount to cumulative error, depriving him of his right to a fair trial.

#### Statement of the Facts and Course of Proceedings

On September 2, 2010, an Information was filed charging Mr. Baker with one count of first degree murder for the death of his eleven week old daughter, G.B. (R., pp.65-66.) Mr. Baker entered a not guilty plea to the charge. (R., pp.75-76.)

Prior to trial, the defense objected to the entry of a computer-animated video (*hereinafter*, video), which was going to be offered to illustrate Dr. Sexton's testimony. (Tr. 1/13/12, p.9, L.23 – p.12, L.25.)<sup>1</sup> The video showed the anatomical structure of the brain, depicted a baby being violently shaken, and showed the injuries that would result from such an event. (State's Exhibit No.3.) The defense argued that the video was not relevant and "extremely prejudicial". (Tr. 1/13/12, p.12, Ls.13-18.) The State asserted

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<sup>1</sup> For ease of reference the trial transcript will be cited as "Tr." and all other transcripts will include the date of the proceeding following the "Tr." citation.

that the video was being offered as an illustrative exhibit only. (Tr. 1/13/12, p.15, L.20 – p.16, L.9.) The district court later found that the video was admissible. (Tr. 1/18/12, p.150, L.18 – p.152, L.10.)

The case proceeded to trial. (R., pp.523-527.) However, the trial resulted in a mistrial. (R., p.526.)

Prior to the start of the second trial, defense counsel again addressed the admissibility of the video, filing a motion in limine to exclude the portion of the video depicting the shaking. (R., pp.772-73.) The district court again denied the motion in limine, finding that the video was relevant and that its probative value was not outweighed by its prejudicial effect. (Tr., p.856, L.23 – p.860, L.14.) The district court instructed the jury that the video was being admitted for illustrative purposes only. (Tr., p.876, Ls.11-19.)

It was undisputed at trial that G.B. stopped breathing while in Mr. Baker's care, in May of 2010. (See *generally* Tr.; State's Exhibit No. 10.) However, the reason that G.B. stopped breathing was fiercely contested throughout trial.

The State presented the testimony of several medical experts, providing differing theories regarding the cause of G.B.'s death. Dr. Christensen, a pediatric intensive care specialist at St. Lukes, treated G.B. when she was admitted to the hospital. (Tr., p.378, Ls.13-18, p.392, L.12 – p.393, L.6.) Dr. Garrison, the forensic pathologist that preformed the autopsy of G.B., determined that the cause of G.B.'s death was abusive head trauma and that her death was a homicide. (Tr., p.494, L.1 – p.495, L.16, p.531, L.8 – p.531, L.22.) On redirect, it was clarified that Dr. Garrison was of the belief that the abusive head injury was the result of an impact trauma. (Tr., p.575, L.18 - p.576,

L.17.) He concluded that there was a non-accidental head injury “that then created a setting in which the child develop[ed] hypoxia and die[d].” (Tr., p.581, Ls.8-10.)

Dr. Rorke-Adams, a neuropathologist, determined that the cause of G.B.’s death was abusive head trauma. (Tr., p.624, Ls.6-13.) She noted that G.B. was injured, lost consciousness, was propped up against some pillows, slumped over, was unable to lift her head, and her oxygen supply was cut off, which resulted in brain necrosis and death. (Tr., p.660, Ls.1-16.) She opined that the subdural hematoma, subarachnoid and retinal hemorrhages were caused by shaking, and that she disagreed with Dr. Garrison in his conclusion that blunt force caused those injuries. (Tr., p.708, Ls.1-23.)

Dr. Crawford, an ophthalmologist with a specialization in ophthalmic pathology, examined G.B.’s eyes post-mortem and noted that there were hemorrhages around the optic nerve that were caused by a nonaccidental head injury. (Tr., p.729, L.13 – p.730, L.6, p.740, Ls.2-25, p.769, Ls.2-6.) Dr. Sexton, a pediatrician, treated G.B. while hospitalized. (Tr., p.830, Ls.3-18.) Dr. Sexton opined that G.B.’s injuries were the result of “a sudden force, rotational in nature, which caused an injury to her brain, and that caused her to stop breathing and for her heart to stop working adequately.” (Tr., p.833, Ls.2-5.) Finally, Dr. Lee, a pediatric ophthalmologist, testified that the retinal hemorrhages found in G.B. were consistent with nonaccidental trauma and could not have been caused by a single blow of blunt force trauma. (Tr., p.959, L.10 – p.961, L.17.)

The State also presented the testimony of several officers, first responders, and individuals that had varying levels of contact with G.B. near the time of her death. (See

*generally* Tr.) The State also called Bryan Keim as a witness. (Tr., p.301, L.25.) Mr. Keim had been incarcerated with Mr. Baker. (Tr., p.303, Ls.1-5.) Mr. Keim testified that Mr. Baker had told him that he “grabbed [G.B.] and just slammed her on the bed really hard . . . .” (Tr., p.313, Ls.10-12.)

The defense presented medical experts whose opinions varied greatly from the State’s experts. Dr. Plunkett, a general and forensic pathologist, testified that he did not believe it was possible to create the kinds of injuries that G.B. sustained from shaking. (Tr., p.1280, Ls.19-25.) Dr. Plunkett determined that G.B. suffered from “[c]omplications of the chronic subdural hematoma and/or the CVT which was ultimately a complication of the chronic subdural hematoma.” (Tr., p.1300, L.11 0 p.1301, L.2.) He noted that cerebral venous thrombosis (CVT) is known to cause seizures and respiratory arrest and that either one could have occurred in G.B. (Tr., p.1301, Ls.3-13.) He concluded that there was no shaking of G.B. prior to her death. (Tr., p.1304, Ls.10-17.)

Dr. Hua, a forensic neuropathologist, noted that there were overlapping subdural hematoma – preexisting and acute. (Tr., p.1423, Ls.9-14.) It was Dr. Hua’s expert opinion that G.B. had a CVT. (Tr., p.1430, Ls.16-25.)<sup>1</sup> He also noted that in shaken baby cases, in which there was a sudden death, one would expect to find axonal damage, but that injury was not present here. (Tr., p.1472, Ls.1-15.)

The jury returned a guilty verdict. (Tr., p.1639, Ls.7-10.)

At the sentencing hearing, the State recommended that the district court impose a fixed life sentence to run consecutive to Mr. Baker’s sentence in a prior case.<sup>2</sup> (Tr. 10/9/13, p.20, Ls.1-2.) Mr. Baker’s counsel did not recommend a specific sentence.

(Tr. 10/9/13, p.20, L.6 – p.27, L.3.) The district court imposed a life sentence, with 15 years fixed, and ordered that the sentence run concurrently to his sentence in the prior case. (Tr. 10/9/13, p.44, L.23 – p.45, L.3; R., pp.940-42.) Subsequently, Mr. Baker filed an Idaho Criminal Rule 34 Motion for a New Trial. (R., pp.933-36.) Mr. Baker also filed a Notice of Appeal that was timely from the district court's Judgment of Conviction and Commitment. (R., pp.954-55.) After a hearing, the district court denied Mr. Baker's motion for a new trial. (Supplemental R., pp.159-79.)

Mr. Baker then filed another Notice of Appeal, which was timely from the district court's Memorandum Decision and Order Re. Defendant's Motion for a New Trial. (Supplemental R., pp.187-91.) Thereafter, Mr. Baker filed a Motion for Reconsideration and a Motion to Proceed Pro Se. (See Supplemental R., pp.181-84, 185-86.) However, at the hearing on the motion for reconsideration, Mr. Baker withdrew the motion. (Augmentation: Court Minutes from 11/5/15 Hearing on Motion for Reconsideration).<sup>3</sup>

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<sup>2</sup> When Mr. Baker was arrested for this charge, he was on parole for the crime of forgery. (PSI, p.10.)

<sup>3</sup> A Motion to Augment was filed contemporaneously with this Appellant's Brief.

## ISSUES

1. Did the district court err in failing to provide the jury with a unanimity instruction and, as a result, violate Mr. Baker's constitutional rights to a unanimous verdict, a fair trial, and due process of law?
2. Did the district court err when it admitted the video animation into evidence as illustrative of Dr. Sexton's testimony because the video was irrelevant, and its prejudicial effect substantially outweighed its probative value?
3. Did the State violate Mr. Baker's right to a fair trial by committing prosecutorial misconduct?
4. Even if the above errors are individually harmless, was Mr. Baker's Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?



## ARGUMENT

### I.

#### The District Court Erred In Failing To Provide The Jury With A Unanimity Instruction And, As A Result, Violated Mr. Baker's Constitutional Rights To A Unanimous Verdict, A Fair Trial, And Due Process Of Law

##### A. Introduction

The district court instructed the jury that Mr. Baker could be found guilty of first degree murder if jurors determined that he battered G.B. and that she died as a result of those injuries. The State presented evidence at trial that G.B.'s death was the result of one of three theories: that G.B. died as a result of a blunt force trauma, that she died as the result of being shaken, or that she died after being placed in a position that allowed her to slump over and obstruct her airway.<sup>4</sup> Mr. Baker acknowledges that the decision in *State v. Severson*, 147 Idaho 694, 710-12 (2009) (holding that a jury need not be instructed that it must unanimously agree on the means by which a person commits a killing in order to find them guilty of murder), does not require unanimity as to the means of the battery. However, he asserts that one of the State's theories does not meet the required elements of first degree murder by the aggravated battery of a child and, as such, a unanimity instruction was necessary.

Even assuming the State's theory that Mr. Baker battered G.B., if she died as a result of an obstructed airway because of her placement in a position that allowed her to slump over, then she did not die as a result of the aggravated battery, but of Mr. Baker negligently or recklessly placing her in an inappropriate position. Under this theory,

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<sup>4</sup> Mr. Baker maintains his innocence. His arguments addressing the State's theories about how G.B. was injured and ultimately died are in no way a concession of his guilt.

Mr. Baker may only be guilty of involuntary manslaughter for G.B.'s death. As such, the district court should have provided the jury with a unanimity instruction to determine whether or not the jury found Mr. Baker responsible for the death of G.B. because she died directly as a result of the battery or because the battery caused her to lose consciousness and ultimately die from an obstructed airway. In failing to give the obligatory unanimity instruction, the district court denied Mr. Baker's constitutional and statutory rights to a unanimous verdict, to a fair trial, and to due process of law.

Mr. Baker concedes that there was no request from trial counsel for a unanimity instruction. Regardless, he asserts that the failure to give the unanimity instruction can be raised on appeal because the absence of the instruction was fundamental error -- he asserts that failure to give a unanimity instruction amounted to a violation of his constitutional rights, the error is plain on the face of the record, and there is a reasonable possibility that the error affected the outcome of the trial.

B. Standard Of Review

A trial court must instruct the jury on all matters of law pertinent to their considerations. *State v. Severson*, 147 Idaho 694, 710 (2009) (citing I.C. § 19-2132). Appellate courts exercise free review over whether jury instructions correctly state the applicable law. *State v. Draper*, 151 Idaho 576, 587-588 (2011) (citation omitted). The instructions are reviewed as a whole, rather than individually, to determine whether the jury was adequately instructed. *Id.* at 588 (citation omitted). An error in jury instructions constitutes reversible error when the instruction prejudices a party or misleads the jury. *Severson*, 147 Idaho at 710.

C. The District Court Erred In Failing To Provide The Jury With A Unanimity Instruction And, As A Result, Violated Mr. Baker's Constitutional Rights To A Unanimous Verdict, A Jury Trial, A Fair Trial, And Due Process Of Law

The district court erred when it failed to give a unanimity instruction requiring the jury to reach a unanimous decision regarding whether G.B. died specifically as a result of airway obstruction due to the placement of her body after a battery, or as a direct result of a battery, regardless of the means of the battery. As a result, Mr. Baker's conviction must be vacated and the case remanded to the district court.

1. The State's Expert Testimony

In the case at hand, the State presented numerous medical experts. These experts provided differing theories about what caused G.B.'s death.<sup>5</sup>

Dr. David Christensen

Dr. Christensen, a pediatric intensive care specialist at St. Lukes, treated G.B. when she was admitted to the hospital. (Tr., p.378, Ls.13-18, p.392, L.12 – p.393, L.6.) He noted that she was in cardio respiratory collapse when she was admitted (Tr., p.393, Ls.9-11), that a CT scan showed subdural hematomas of varying ages (Tr., p.399, Ls.13-22), that there were retinal hemorrhages consistent with shaking (Tr., p.402, Ls.4-12), and that G.B. never breathed normally again after being admitted (Tr., p.407, Ls.22-25).

Dr. Charles Garrison

The next medical expert to testify for the State was Dr. Garrison, the forensic pathologist that preformed the autopsy of G.B. (Tr., p.494, L.1 – p.495, L.16.)

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<sup>5</sup> Mr. Baker also presented medical experts whose opinions varied greatly from the State's experts.

Dr. Garrison was first notified about G.B. when she was still alive, and he was able to talk to her physicians prior to her death. (Tr., p.495, Ls.1-13.) He determined that the cause of G.B.'s death was abusive head injury. (Tr., p.498, Ls.11-17.)

The autopsy findings revealed a small bruise on the right temple and blood in the cranial cavity. (Tr., p.500, Ls.13-25.) The blood was fluid and just clotting so Dr. Garrison believed the injury had occurred within the prior few days. (Tr., p.501, L.20 – p.502, L.1.) There was also evidence of an older bleed. (Tr., p.502, Ls.3-6.) G.B. also had retinal hemorrhages. (Tr., p.505, Ls.1-2.) The subdural hematomas, blood in the cranial cavity, and the retinal hemorrhages were consistent with trauma injuries. (Tr., p.504, Ls.2-9, p.505, Ls.1-19.)

In examining the small temple bruise, Dr. Garrison noted that the bruising was recent and went through the full thickness of the scalp tissues. (Tr., p.509, Ls.1-14.) He believed that the bruise was caused by a blunt force trauma. (Tr., p.510, Ls.8-24.) On cross-examination, Dr. Garrison stated that the bruise was of such significance that it could represent the point of impact for an injury that was serious enough to cause the death of G.B. (Tr., p.544, Ls.4-7.)

With acute hemorrhaging, like the kind exhibited by G.B., it would be expected that the individual would stop breathing almost immediately. (Tr., p.523, L.17 – p.524, L.12.) When an individual stops breathing, oxygen is no longer being transmitted to the brain, and brain death will occur. (Tr., p.524, Ls.13-19.) G.B. suffered an ischemic encephalopathy (a lack of blood flow to the brain) prior to her arrival at the hospital. (Tr., p.524, L.20 – p.252, L.12.)

Although Dr. Garrison initially believed that G.B. had suffered nerve damage to the brain stem, after he received the report from neuropathologist, Dr. Rorke-Adams, he determined that there was no nerve damage to the brainstem. (Tr., p.527, L.5 – p.529, L.7.) He also admitted that he initially believed that there was an axonal injury, but that he was incorrect. (Tr., p.559, Ls.2-13.)

Dr. Garrison maintained that G.B. died from abusive head trauma and that her death was a homicide. (Tr., p.531, L.8 – p.531, L.22.) Dr. Garrison was not able to say to a reasonable degree of medical certainty that this was a shaking case. (Tr., p.552, Ls.8-13.) Although he did aver that shaking was “probably part of it” at trial, he was unable to identify any external physical evidence of shaking, and, at the time of the preliminary hearing, he was of the opinion that this was not a shaking case. (Tr., p.552, L.5 – p.554, L.14.) He noted that the subdural hematoma did not directly cause the death, nor did the retinal hemorrhages. (Tr., p.555, Ls.3-9.)

On redirect, it was clarified that Dr. Garrison was of the belief that the abusive head injury was the result of an impact trauma. (Tr., p.575, L.18 - p.576, L.17) Although he initially believed that G.B. had global ischemic encephalopathy (brain death due to lack of oxygen) as a result of an axonal injury, he later testified that it was a result of hypoxia due to blunt force trauma. (Tr., p.579, L.11 – p.580, L.17.) He concluded that there was a non-accidental head injury “that then created a setting in which the child develop[ed] hypoxia and die[d].” (Tr., p.581, Ls.8-10.)

Dr. Lucy Rorke-Adams

Dr. Rorke-Adams is a neuropathologist who consulted on the G.B. case. (Tr., p.616, Ls.16-20.) Dr. Rorke-Adams reviewed G.B.’s medical records, the autopsy

report, G.B.'s tissues samples, police reports, reports from other experts that had looked at the case, and the preliminary hearing transcript to prepare her for forming a professional opinion about the death of G.B. (Tr., p.616, L.21 – p.617, L.7, p.620, Ls.9-24.) Based upon this information, Dr. Rorke-Adams determined that the cause of G.B.'s death was abusive head trauma. (Tr., p.624, Ls.6-13.)

The medical findings showed that G.B. had suffered a trauma to the head that would indicate a tearing of the bridging veins, a trauma to the right forehead that caused bruising, and that there was likely a shaking component to the injury as evidenced by the damage noted in the eyes. (Tr., p.635, L.22 – p.636, L.6.) The bilateral nature of the subdural hematoma contributed to Dr. Rorke-Adams' opinion that G.B. was violently shaken. (Tr., p.638, L.23 – p.639, L.7.) She said that, with this type of injury an infant would likely lose consciousness, they may have a seizure, a cardiac problem, or a respiratory problem. (Tr., p.640, Ls.1-11.) Dr. Rorke-Adams noted in her report that G.B. suffered from global ischemic encephalopathy, described as G.B.'s entire brain being deprived of oxygen and, as a result, neurons died throughout her brain. (Tr., p.658, L.23 – p.659, L.4.)

While the impact to G.B.'s right temple was not fatal, the shaking led to a loss of consciousness and "then a secondary interference with her ability to take in oxygen" which caused the death. (Tr., p.659, Ls.13-19.) In further discussing the secondary interference, Dr. Rorke-Adams noted that:

Well, what happened to this child was that she was injured. She lost consciousness. And then she was placed in a sitting position on a couch. She was propped up against some pillows. And that she was left.

And in her unconscious state, and because of her immaturity, she was not able to hold her head up, so she slumped forward and cut off the intake of air through her nose and mouth and was left this way.

And because she's less than four months old, she can't move her head out of that position, she can't roll herself over.

And the period of interference with oxygen/air intake was sufficiently prolonged to have caused the brain to undergo this necrosis and led to her death.

(Tr., p.660, Ls.1-16.)

She further noted that such a loss of consciousness may only be for a short time, but the infant would not look normal, it may have a period of lethargy, would not be interested in taking a bottle, and would clearly manifest some signs of injury.

(Tr., p.661, Ls.1-12.)

In summation, the prosecutor asked Dr. Rorke-Adams the following:

Q. Ok. Now I want to make sure I understand. You – initially you said – initially you testified or before the break you said the bruise did not cause [G.B.] to die; is that right?

A. Yes.

Q. Okay. Did the subarachnoid hemorrhage cause her to die?

A. No.

Q. Did the subdural hematoma cause her to die?

A. No.

Q. What about the retinal hemorrhages, did that cause her to die?

A. No.

Q. What caused [G.B.]'s death in this case?

A. The lack of oxygen to her brain caused her death.

Q. What caused the lack of oxygen to her brain?

A. Her unconscious state when she was placed in the sitting position and because of her age, she was unable to hold her head up, and so she fell, she slumped over and obstructed her airway.

And the obstruction to the airway was sufficiently long to have interfered with her breathing and, hence, her brain was deprived of oxygen and she died of the deprivation of oxygen.

...

Q. What caused [G.B.]’s loss of consciousness in this case?

A. The concussive head injury, the shaking of the brain and injury to the brain that led her to lose consciousness.

(Tr., p.682, L.14 – p.684, L.8.)

On cross-examination, Dr. Rorke-Adams again clarified that neither the subdural hematoma, the subarachnoid hemorrhages, the temple contusion, nor the retinal hemorrhages caused the death of G.B. (Tr., p.686, L.24 – p.688, L.6.) She noted that the subdural hematoma, subarachnoid and retinal hemorrhages were caused by shaking and that she disagreed with Dr. Garrison in his conclusion that blunt force caused those injuries. (Tr., p.708, Ls.1-23.) Dr. Rorke-Adams also noted that “even if [G.B.] had been conscious, she would not have been able to roll from a prone position to open the airway, as this ability does not develop until a baby is five or six months of age” and that, as such, she could have slumped over, obstructed her airway, and suffered the global ischemic hypoxia that caused her death. (Tr., p.715, Ls.4-15; Def. Ex. 611.) Ultimately, Dr. Rorke-Adams believed that G.B.’s death was a homicide. (Tr., p.726, Ls.16-18.)

Dr. Brooks Crawford

Dr. Crawford, an ophthalmologist with a specialization in ophthalmic pathology, examined G.B.’s eyes post-mortem and noted that there were hemorrhages around the



optic nerve that were caused by a nonaccidental head injury. (Tr., p.729, L.13 – p.730, L.6, p.740, Ls.2-25, p.769, Ls.2-6.) Later, on cross-examination, Dr. Crawford admitted that the hemorrhages could be caused by “shaking, strangulation or both.” (Tr., p.774, Ls.7-18.)

Dr. Michael Sexton

Dr. Sexton, a pediatrician, treated G.B. while she was hospitalized. (Tr., p.830, Ls.3-18.) He noted that G.B. had suffered a brain injury as evidenced by bleeding between her skull and her brain, and broken blood vessels in her eyes. (Tr., p.831, Ls.7-16.) Dr. Sexton opined that G.B.’s injuries were the result of “a sudden force, rotational in nature, which caused an injury to her brain, and that caused her to stop breathing and for her heart to stop working adequately.” (Tr., p.833, Ls.2-5.) He believed that G.B.’s injuries were the result of being violently shaken. (Tr., p.834, Ls.2-19.) In his experience, an infant that had sustained a shaking type injury would immediately lose consciousness, breathing would be interrupted, there could be gagging or vomiting, and the child would become unresponsive. (Tr., p.834, L.20 – p.835, L.3.)

Ultimately, Dr. Sexton’s opinion was that G.B.’s death was the result of abusive head trauma and that, as a result of the shaking, G.B. lost consciousness, stopped breathing, and slumped over. (Tr., p.884, Ls.13-22.) He concluded that absent the abusive head trauma, G.B. would not have stopped breathing or passed away. (Tr., p.884, L.23 – p.885, L.1.)

Dr. Katherine Lee

Dr. Lee, a pediatric ophthalmologist, was called in to consult on G.B.'s injuries and found numerous retinal hemorrhages in both eyes. (Tr., p.949, L.16 – p.951, L.10.) Dr. Lee believed that the retinal hemorrhages were consistent with nonaccidental trauma and could not have been caused by a single blow of blunt force trauma. (Tr., p.959, L.10 – p.961, L.17.)

2. The State's Theories Regarding G.B.'s Death

The State clearly presented evidence tending to show that G.B.'s death was a homicide. Based upon the expert medical testimony, the State's theories were that G.B.'s death was caused by one of three distinct actions by Mr. Baker: (1) a blunt force impact injury caused at the hands of Mr. Baker, (2) a sudden force rotational injury (shaking) at the hands of Mr. Baker, or (3) Mr. Baker's placement of G.B. in a position that resulted in her slumping over and her airway being obstructed, possibly after she lost consciousness as a result of suffering abusive head trauma at the hands of Mr. Baker.

3. A Unanimity Instruction Was Required

A trial court presiding over a criminal case must instruct the jury on all matters of law necessary for the jury's information or "the rules of law that are 'material to the determination of the defendant's guilt or innocence.'" I.C. § 19-2132; *Severson*, 147 Idaho at 710 (quoting *State v. Mack*, 132 Idaho 480, 483 (Ct.App.1999)). In Idaho, in all criminal cases, the jury's verdict must be a unanimous verdict. See I.C. §§ 19-2316, 19-2317, Idaho Criminal Rule 31. Furthermore, the Idaho Constitution provides that in a

felony criminal trial a jury's verdict must be unanimous. See IDAHO CONST. art. I, § 7. Although this section does not specifically state that felony trials require a unanimous verdict, that conclusion is inescapable from the provision's language. "The right of a trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict." *Id.* By failing to provide for less than a unanimous verdict in felony cases, but providing for such in other types of cases, the Idaho constitution guarantees the right to a unanimous jury verdict in all felony criminal cases. In fact, during the 1889 debates on the Idaho Constitutional Convention, the delegates expressly rejected inclusion of language into § 7 of the Idaho Constitution which would permit a felony conviction without a unanimous verdict.<sup>6</sup> Representative Albert Hagan expressed the sentiment of the majority of delegates when he stated, "I do not believe in a criminal case we should touch one single hair of his head, around whom the safeguards of the constitution have always been placed – that he should be convicted without a unanimous verdict of his countrymen."<sup>7</sup>

In order to preserve the right to a unanimous jury verdict, a unanimity instruction must be given "when it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *State v. Gain*, 140 Idaho 170, 172 (Ct. App. 2004).

Where the evidence indicates that separate and distinct incidents of criminal conduct could provide a basis for a juror's finding of guilt on the criminal charge in any count, the trial court must instruct the jury that it

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<sup>6</sup> *Proceedings and Debates of the Constitutional Convention of Idaho 1889*, Vol. I, p.259, Caldwell: Caxton Printers, Ltd., 1912.

<sup>7</sup> *Id.* at 240.

must unanimously agree on the specific incident constituting the offense in each count . . . .

*Id.* at 172-173. “A unanimity instruction is used to tell the jury that they must find a defendant guilty beyond a reasonable doubt based on a single agreed upon incident, thus ensuring the defendant has a unanimous jury verdict.” *State v. Montoya*, 140 Idaho 160, 167 (Ct. App. 2004). A separate incident requiring a unanimity instruction has been defined as “a distinct union of *mens rea* and *actus reus* separated by a discrete period of time and circumstance from any other such similar incident.” *Miller v. State*, 135 Idaho 261, 268 (Ct. App. 2000).

In recent years, the Idaho Supreme Court has relied on *State v. Nunez*, 133 Idaho 13, 19 (1999) (holding that the jury must only reach a unanimous decision regarding the defendant's guilt, not the underlying facts that establish the elements of the charged crime), and *Schad v. Arizona*, 501 U.S. 624, 631 (1991) (“We have never suggested that in returning general verdicts ... jurors should be required to agree upon a single means of commission.”), to limit when a unanimity instruction is necessary. In *Severson*, the Idaho Supreme Court held that a unanimity instruction was not necessary in cases where distinct means of first degree murder were alleged -- strangulation, overdose, or a combination of both. *Severson*, 147 Idaho at 710-12. Similarly, in *State v. Johnson*, 145 Idaho 970 (2008), the Court found that “it is unnecessary to instruct the jury that it must be unanimous as to the theoretical basis for committing the offense (aider and abettor or principal) because aiding and abetting is not a separate offense from the substantive crime.” *Id.* at 978. However, Mr. Baker's case is easily distinguishable.

Initially, it must be clarified that Mr. Baker is not asserting that the jury was required to be unanimous regarding the means of the battery. He concedes that based upon the above authority, the means or way in which G.B. was allegedly battered is not a question that requires a unanimous verdict. Instead, he asserts that the jury should have been required to make a unanimous finding as to whether Mr. Baker was responsible for the death of G.B. by committing a battery upon her which resulted directly in her death or by placing her body in a position that resulted in a death by airway obstruction. Unlike *Nunez, Schad, Severson, and Johnson*, the unanimity issue in this case does not deal with a means of committing a single distinct crime, but results in a conviction for a first degree murder for a death as by means of committing an aggravated battery on a child under twelve years of age or, arguably, the two separate offenses of aggravated battery and involuntary manslaughter.

The crimes of involuntary manslaughter and first degree murder have different elements and different punishments. As charged, the State was required to prove that Mr. Baker committed or attempted to commit an aggravated battery on G.B., who was under the age of 12, which caused her death. The expert testimony of several doctors supported this theory. However, the State also chose to present an alternate theory regarding Mr. Baker's responsibility for the death of his daughter. Arguably, this alternate theory did not satisfy the required elements for first degree murder.

Under the obstructed airway theory, it was not the battery that caused the death, but the negligent or reckless placement of G.B. that resulted in her death. As Dr. Rorke-Adams testified, neither the subdural hematoma, the subarachnoid hemorrhages, the temple contusion, nor the retinal hemorrhages caused the death of

G.B. (Tr., p.682, L.14 – p.684, L.8, p.686, L.24 – p.688, L.6.) She found instead that G.B. slumped over, had an obstructed airway, and suffered the global ischemic hypoxia that caused her death. (Tr., p.682, L.14 – p.684, L.8, p.715, Ls.4-15.) Dr. Rorke-Adams also noted that “even if [G.B.] had been conscious, she would not have been able to roll from a prone position to open the airway, as this ability does not develop until a baby is five or six months of age.” (Tr., p.715, Ls.4-15; Def. Ex. 611.) This theory falls in line with negligent involuntary manslaughter. For an involuntary manslaughter conviction, the State would have had to prove that Mr. Baker placed G.B. in a prone position in which she could slump over, obstructing her airway, that this placement of G.B. was conduct that an ordinary person would anticipate could result in death, and that Mr. Baker’s conduct in placing G.B. in this position was committed with reckless disregard of the consequences. See I.C. § 18–4006(2); ICJI 711 Involuntary manslaughter – Negligence.

There is a great difference in the possible punishment for the different homicides. For first degree murder, the punishment is a minimum of ten years, with up to a life sentence. (I.C. § 18-4004.) For involuntary manslaughter, the punishment is a maximum of 10 years. (I.C. § 18-4007.)

Furthermore, this distinct criminal conduct, as presented by the State’s competing theories, involves a distinct union of *mens rea* and *actus reus*. For death as a result of the battery theory, the *mens rea* and *actus reus* are tied exclusively to the aggravated battery. However, for the airway obstruction theory, the battery is tangential and is only relevant to provide one of two theories about why G.B. slumped over.

Instead, the *mens rea* and *actus reus* are tied to the placement of G.B. in such a way that she could slump over and her airway could be obstructed.

The *Schad* plurality noted that “[t]o require unanimous factual findings would ignore the fact that ‘different jurors may be persuaded by different pieces of evidence, even [though] they agree upon the bottom line.’” *Schad*, 501 U.S. at 631–32 (*citation omitted*). While it can be assumed from the verdict that the jury found Mr. Baker was responsible for his daughter’s death, without a unanimity instruction, it is unascertainable whether the jury believed the State’s experts claiming G.B. died from the aggravated battery or the expert claiming she died from airway obstruction. The difference is vital as the theories of death could not all result in a first degree murder conviction. In the case at hand, without a unanimity instruction, we cannot definitively know if the jury agreed “upon the bottom line.” While under either theory the jury could find that Mr. Baker was responsible for G.B.’s death, the two theories present distinct criminal acts. Therefore, this is not a case of “an immaterial difference as to mere means,” but a case where there was “a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings.” *Schad*, 501 U.S. at 633.

Because separate and distinct incidents of criminal conduct in this case could have provided a basis for the jurors’ finding of guilt on the criminal charge of first degree murder, the trial court erred when it failed to instruct the jury that it must unanimously agree on the specific theory - battery or airway obstruction - constituting the offense. This is not the unanimous jury verdict contemplated by the Idaho Constitution, I.C. §§ 19-2316 and 19-2317, and Idaho Criminal Rule 31. Because it is impossible to tell

whether the jury correctly reached its verdict unanimously, or incorrectly reached its verdict based upon opposing theories, this Court must vacate the conviction and remand the case for a new trial. See *State v. Luke*, 134 Idaho 294, 301 (2000).

D. The District Court's Failure To Provide A Unanimity Instruction Constitutes Fundamental Error Under The Facts Of This Case And Requires That This Court Vacate Mr. Baker's Conviction

This Court may review unobjected to jury instructions under Idaho's fundamental error rule. *State v. Adamcik*, 152 Idaho 445, 472-473 (2012) (citing *State v. Johnson*, 145 Idaho 970 (2008)). "The *Perry* fundamental error test requires the defendant to show three things: (1) the alleged error violated an unwaived constitutional right; (2) the alleged error plainly exists; and (3) the alleged error was not harmless." *Id.* at 473 (citing *Perry*, 150 Idaho at 228). For the reasons stated below, Mr. Baker asserts that the district court's failure to provide a unanimity instruction meets the fundamental error standard requiring his conviction to be vacated.

1. The Failure To Provide A Unanimity Instruction Violated Mr. Baker's Constitutional Rights

In the present case, Mr. Baker alleges he has lost his constitutional and statutory rights to a unanimous verdict. The right to a unanimous jury verdict in a felony criminal trial is so fundamental to the citizens of Idaho that it has been expressed in both the constitution and in statutes. See IDAHO CONST. art. I, § 7, I.C. §§ 19-2316, 19-2317 and Idaho Criminal Rule 31.

If any member of the jury returned a guilty verdict based upon the theory that Mr. Baker was responsible for his daughter's death by placing her body in a way that allowed for airway obstruction, the State was relieved of its burden to prove every



element of the charged crime. As such, the failure to provide a unanimity instruction also implicated Mr. Baker's rights to a jury trial and to due process of law.

A criminal defendant's right to a fair trial is protected by the due process clause of the Fourteenth Amendment and Article I, § 13 of the Idaho Constitution. U.S. CONST. amend XIV; ID. CONST. art. 1 § 13. The Idaho Court of Appeals has observed:

An erroneous instruction that relieves the State of its burden to prove an element of a charged crime can be characterized as either a violation of due process, *State v. Draper*, 151 Idaho 576, 588, 261 P.3d 853, 865 (2011); *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886, 892 (2007); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 2080–81, 124 L.Ed.2d 182, 188–89 (1993); or as a violation of the Sixth Amendment's jury trial guarantee. *Neder v. United States*, 527 U.S. 1, 12, 119 S.Ct. 1827, 1835, 144 L.Ed.2d 35, 48–49 (1999); *Sullivan*, 508 U.S. at 277–78, 113 S.Ct. at 2080–81, 124 L.Ed.2d at 187–88.

*State v. Parsons*, 153 Idaho 666, 669 (Ct. App. 2012)

In the case at hand, it is impossible to ascertain whether the jury correctly reached its verdict unanimously, or incorrectly reached its verdict based upon opposing theories. The failure to provide a unanimity instruction in this case, not only implicated Mr. Baker's constitutional and statutory rights to a unanimous verdict, but also his federal and state constitutional rights to due process and a jury trial. As such, the error is reviewable for fundamental error.

## 2. The Instructional Error Is Plain On Its Face

The error in this case plainly exists from the record and no additional information is necessary. Further, it cannot be a tactical decision on the part of the defense to have a jury reach a verdict which is not unanimous and may ultimately result in a far greater punishment than the evidence may provide for – first degree murder rather than involuntary manslaughter. There is no reason to believe that Mr. Baker's counsel was

“sandbagging” the district court by failing to request a unanimity instruction. The error in question is a matter of law, not of fact, is clear from the face of the record, and there is no basis to conclude that Mr. Baker’s counsel knew that a unanimity instruction should be provided, but chose not to request the instruction. Therefore, the instructional error is plain on its face.

3. The Instructional Error Is Not Harmless

Because Mr. Baker did not request the unanimity instruction during trial, he bears “the burden of proving there is a reasonable possibility that the error affected the outcome of the trial.” *Perry*, 150 Idaho at 226. Mr. Baker asserts that there is a reasonable possibility that the instructional error affected the outcome of his trial.

In this case, not only did the jury hear the expert testimony of several medical professionals with differing theories, the State also spent a great deal of time discussing the different theories regarding G.B.’s death and also highlighted Dr. Rorke-Adam’s airway obstruction theory numerous times in closing arguments.

Let’s first talk about the force and violence that was inflicted on this child. She was violently shaken. She had no ability to control her own head from stopping. It’s the heaviest part of her body. And it went back and forth and back and forth.

She also had a nice blow to her head by blunt force. This – these two items caused her to stop breathing. . . and she lost consciousness.

And because she wasn’t getting any oxygen, this caused her to become brain dead. That’s the force and violence piece.

(Tr., p.1535, Ls.4-15.)

Why do we know apnea and loss of consciousness and irreversible brain damage occurred? Because Dr. Rorke-Adams testified she had been placed against these pillows. And she had been injured shortly

before. They probability she would have been unconscious was extremely high.

She was only three months of age and she didn't have the strength to put her head up and breathe. And so in the condition in which she found herself placed there by the defendant in the loss of conscious state after having just suffered that, she couldn't breathe. She couldn't get the oxygen.

(Tr., p.1547, L.15 – p.1548, L.1.)

Dr. Garrison at the preliminary hearing said impact shaking part of it. Dr. Sexton, violent shaking. Dr. Rorke-Adams, apnea, loss of consciousness, part of it, part of the head injury. This is what they're saying – not cause of death but mechanism.

Mechanism of why she died. Impact, violent shaking and, Rorke-Adams, abusive head trauma but apnea her oxygen getting cut off. Dr. Christensen, violent shaking. . . .

I don't have to put forth experts that are going to agree. I'm telling you this is what happened, and they can't necessarily agree because they do have different interpretations.

(Tr., p.1624, L.19 – p.1625, L.12.)

Additionally, Dr. Rorke-Adams' testimony was highlighted in a closing argument slide. (State's Closing and Rebuttal, Closing PowerPoint slide 49.) Specifically, this slide noted Dr. Rorke-Adams' theory that G.B. had slumped over, and her oxygen supply was cut off. (State's Closing and Rebuttal, Closing PowerPoint slide 49.) The State also pointed out in the rebuttal closing that Dr. Garrison believed G.B. had sustained her injuries from an impact, Dr. Sexton by violent shaking, Dr. Rorke- Adams by apnea or loss of consciousness, and Dr. Christensen by violent shaking. (State's Closing and Rebuttal, Rebuttal PowerPoint slide 6.)

As such, it is impossible to tell which of the theories of death the jury found to be credible. Contrary to the prosecutor's suggestion otherwise, negligently or recklessly

placing G.B. in a position that allowed for her airway to become obstructed is simply not a death as a result of a battery. Dr. Rorke-Adams specifically testified that none of G.B.'s injuries caused G.B.'s death, but that the loss of oxygen was the cause of death. (Tr., p.682, L.14 – p.684, L.8, p.686, L.24 – p.688, L.6.) Because it is impossible to tell whether the jury correctly reached its verdict unanimously, or incorrectly reached its verdict based upon divergent theories, the error cannot be harmless, and this Court must vacate the conviction and remand the case for a new trial. See *State v. Luke*, 134 Idaho 294, 301 (2000).

## II.

### The District Court Erred When It Admitted, As An Illustrative Exhibit, A Video Animation Showing A Baby Being Shaken And The Resulting Injuries Because The Video Was Irrelevant, And Its Prejudicial Effect Outweighed Its Probative Value

#### A. Introduction

Prior to trial, the defense objected to the entry of a computer-animated video that was initially played at the preliminary hearing to illustrate Dr. Sexton's testimony. (Tr. 1/13/12, p.9, L.23 – p.12, L.23.) The video consisted of two parts. The first part showed the anatomical structure of the brain. The second part depicted a baby being violently shaken and the injuries that would result from such an event. (State's Exhibit No. 3.) The defense argued that the video was not relevant and "extremely prejudicial." (Tr. 1/13/12, p.12, Ls.13-18.) The State asserted that the video was being offered as an illustrative exhibit only and offered to play it so the district court could rule on its admissibility. (Tr. 1/13/12, p.15, L.20 – p.16, L.9.) In a subsequent hearing, the State said the video was relevant as an illustrative exhibit because Dr. Sexton would explain that G.B. stopped breathing as a result of the shaking "because those axons are ripped

apart in her brainstem so she stops breathing.” (Tr. 1/18/12, p.145, L.23 – p.146, L.1.) The district court found that the video was relevant and that the probative value of the video was not outweighed by the danger of unfair prejudice. (Tr. 1/18/12, p.150, L.18 – p.152, L.10.)

Defense counsel later filed a motion in limine to exclude the second portion of the video because the State had recently asserted that the manner of death was “asphyxiation by compromised airway rather than abusive head trauma.” (R., pp.772-73.) Additionally, defense counsel argued that there was no scientific basis for the demonstration. (R., p.773.) On cross-examination, Dr. Sexton agreed that no specific cause of death was found because there was no brainstem infarction or axonal injury. (Tr., p.874, Ls.15-25.) Nevertheless, during trial, the district court denied the motion in limine because it found that the video was relevant and that its probative value was not outweighed by its prejudicial effect. (Tr., p.856, L.23 – p.860, L.14.) The district court gave the jury an instruction that the video was being admitted for illustrative purposes only. (Tr., p.876, Ls.11-19.)

The district court erred as the video depicted some injuries that did not occur in the case at hand. Therefore, the video was not relevant. Moreover, the video was highly prejudicial because it was misleading and inflammatory.

#### B. Standard Of Review

The relevancy of evidence is reviewed *de novo*. *State v. Shutz*, 143 Idaho 200, 202 (2006) (citing *State v. Lamphere*, 130 Idaho 630, 632 (1997)). The district court’s determination of whether the probative value of evidence is outweighed by the danger of unfair prejudice is reviewed for an abuse of discretion. *Id.* Appellate courts use a

three-part test for determining whether a district court abused its discretion: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *State v. Stevens*, 146 Idaho 139, 143 (2008) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991)).

C. The District Court Erred When It Admitted, As An Illustrative Exhibit, A Video Animation Showing A Baby Being Shaken And The Resulting Injuries Because The Video Was Irrelevant, And Its Prejudicial Effect Outweighed Its Probative Value

The district court found that the video was relevant. (Tr., p.856, L.23 – p.859, L.17.) To be relevant, evidence must have a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” *State v. Raudebaugh*, 124 Idaho 758, 766 (1993) (quoting I.R.E. 401). Under Idaho Rule of Evidence 402, evidence that is irrelevant must be excluded. *Id.* For an exhibit to be admitted for illustrative purposes, it must make some issue in the case more clear. *Masters v. Dewey*, 109 Idaho 576, 579 (1985). However, even relevant evidence can still be excluded when “its probative value is substantially outweighed by the danger of unfair prejudice.” *State v. Page*, 135 Idaho 214, 219 (2000) (citing I.R.E. 403). Here, the district court erred in admitting the video for illustrative purposes because it was not relevant to the case and, even if it was relevant, its relevance was substantially outweighed by its prejudicial effect because of its misleading and inflammatory effect on the jury.

1. The Video Was Not Relevant And Should Not Have Been Admitted

The district court's finding that the video was relevant for illustrative purposes was erroneous because the video depicted several injuries that did not occur in this case. In denying the motion, the district court relied on *State v. Stevens*, 146 Idaho 139 (2008). (Tr. p.859, Ls.4-8.) This case, however, is easily distinguished from *Stevens*. In *Stevens*, a video was used by the expert to discredit the defendant's theory that the victim fell down the stairs. *Id.* at 143. The video showed "computer generated objects falling down stairs to illustrate" the expert's testimony that the victim could not have received his injuries from a fall down the stairs. *Id.* at 142. Mr. Stevens argued that the video was not accurate and therefore not relevant, but the Idaho Supreme Court held that accuracy "is not the standard governing relevance of illustrative evidence; rather, the illustrative evidence must only be relevant to the witness's testimony." *Id.* at 143. The Court went on to state that "[t]his is particularly true when the events surrounding a death are in dispute" and said that "the purpose of [the expert's] testimony was to support the State's theory and discredit Stevens's theory." *Id.*

Additionally, the *Stevens* Court stated, "The issue for the jury to determine was whether Stevens caused [the victim's] injuries and death. Therefore, whether it was possible for [the victim's] injuries to have come from such a fall, as Stevens claimed, was a material issue to the case." *Id.* at 144. As such, it held that the video was relevant because it was illustrative of the expert's testimony, and the expert used it "to understand the principles involved and in his analysis of *whether [the victim's] injuries could have come from a fall down the stairs.*" *Id.* (emphasis added).

Here, the State tried to draw parallels to *Stevens* at trial; it said that “the sole purpose of Dr. Sexton’s testimony” was to “support the State’s theory that the defendant violently shook and impacted the baby right before she stopped breathing and to discredit the defendant’s theory that she choked on formula.” (Tr., p.804, Ls.18-22.) While that may have been the purpose of his testimony, Dr. Sexton did not use the video in the same way that the expert used the video in *Stevens*, and the video was not necessary to disprove a theory as it was in *Stevens*. Dr. Sexton did not use the video to analyze whether G.B.’s death could not have occurred from choking. If the video had illustrated the mechanics of choking and the resultant injuries, and Dr. Sexton had used the video to explain why G.B.’s death could not have come from choking, then *Stevens* may have been applicable. Here, the video was only used as a sort of visual supplement to show what happens when a baby is shaken. It was not necessary to Dr. Sexton’s testimony, and he did not use it to analyze whether G.B.’s injuries could have come from choking. Therefore, it was not relevant for the purposes articulated by the State.

Furthermore, the video was not relevant to Dr. Sexton’s testimony because it depicted several events that Dr. Sexton admitted either never occurred or could not be proven from the evidence. On cross-examination, Dr. Sexton admitted that both the autopsy and the MRI showed only a small subdural hematoma in the back of G.B.’s head, and there was no evidence of a large subdural hematoma that covered the entire upper region of the brain, which is what the video depicted. (Tr., p.893, L.12 – p.894, L.17.) In fact, the volume of blood in the hematoma was only two teaspoons. (Tr., p.844, L.24 – p.845, L.12.) There was also no direct evidence that bridging veins



were torn, but the video clearly depicted that injury occurring. (Tr., p.845, L.23 – p.846, L.5.) Finally, Dr. Sexton admitted that the autopsy report showed no evidence of soft tissue damage to the spine, and no bruising around the ribcage, the chin, or the chest, which likely would have been caused by the violent shaking that the video depicted. (Tr., p.864, L.2 – p.866, L.16, p.890, L.24 – p.893, L.10.)

Therefore, the video was not only irrelevant because it depicted some events that were not proven to have occurred in this case, but it was highly confusing and more prejudicial than probative. (See *infra* Section 2.) Further, because the video depicted a means of death that was not supported by the medical evidence, it only served to confuse the issues and mislead the jury. In short, the video did not make the issue of whether Mr. Baker was responsible for his daughter's death more clear. To the contrary, it only muddled the waters.

The issue in this case was not what happens when a baby is shaken, but whether G.B. was battered and died as a result of the battery, i.e., whether G.B. was potentially shaken. Some of the injuries depicted in the video were, in fact, not injuries that G.B. sustained. Depictions of the injuries that *can happen* when a baby is shaken are not probative of whether G.B. was shaken, when she did not exhibit certain injuries. Therefore, the video was not relevant.

2. Assuming Arguendo That The Video Was Relevant, The Probative Value Was Substantially Outweighed By Its Tendency To Mislead And Confuse The Jury And Its Highly Prejudicial Effect

The district court found that the probative value of the video was not substantially outweighed by its prejudicial effect. (Tr., p.859, L.18 – p.860, L.7.) The determination to admit or exclude relevant evidence is made by the trial court. *State v. Joy*, 155 Idaho

1, 6 (2013) (citations omitted). “The applicable rule in determining whether such relevant evidence is admissible is whether its ‘probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” *State v. Enno*, 119 Idaho 392, 405 (1991) (quoting I.R.E. 403). This inquiry focuses on whether the evidence “invites inordinate appeal to lines of reasoning outside of the evidence or emotions which are irrelevant to the decision making process.” *State v. Rhoades*, 119 Idaho 594, 604 (1991).

Here, any probative value was outweighed by the video’s prejudicial effect because it was not only misleading, but it appealed to the emotions of the jury due to its graphic nature, and it was used in the State’s closing argument for an inappropriate purpose.

a. Any Probative Value Of The Video Was Substantially Outweighed By The Danger Of Unfair Prejudice

The video’s potential to appeal to lines of reasoning outside the evidence and the jury’s emotions was significant. As discussed above, some of the injuries depicted in the video were not injuries that G.B. sustained. (See *supra* Sections I(C)(1) and II (C)(1).) Those injuries were not supported by the medical evidence, including the autopsy. (Defendant’s Exhibit 529.) Therefore, the video had the potential to appeal to lines of reasoning outside the evidence.

More importantly, the second part of the video showed the hand of a full-grown adult shaking an infant so violently that its head repeatedly slams into its chest. (State’s Exhibit 3.) This is followed by an image of the brain with veins bursting from the

shaking and blood flowing over the entire upper surface of the brain. (State's Exhibit 3.) This was not supported by the facts of this case and had the strong potential to inflame the jury so that it might reach a guilty verdict based on emotion rather than the evidence presented. The video was also obviously far more graphic than the *Stevens* video, which depicted only inanimate objects. As such, any probative value that the video had was substantially outweighed by the danger of unfair prejudice.

b. The Video Was Used For An Inappropriate Purpose

The State did not limit its use of the video to illustrating Dr. Sexton's testimony. One frame from the video was used repetitively in the State's closing argument. (See *infra* Issue III). It was an image that was taken from the second part of the video and clearly showed an adult's hand gripping the baby's chest. However, there was no evidence, and no testimony from any witness, that Mr. Baker gripped G.B.'s chest.

As such, while the district court correctly perceived that the issue was one of discretion and acted within the outer boundaries of its discretion, it did not act consistently with the legal standards applicable to the specific choices available to it because it failed to find that the minimally probative value of the video was substantially outweighed by the danger of unfair prejudice and misleading the jury. Therefore, the district court abused its discretion.

3. The Admission Of The Video Was Not Harmless Error

The admission of the video was not harmless error. The harmless error doctrine has been defined by this Court: "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101

Idaho 498, 507 (1980) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Where alleged error is raised, allowing the district court to rule upon the issue, and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman*. See *State v. Perry*, 150 Idaho 209, 227 (2010). In this case, the State will simply be unable to prove that the admission of the video was harmless error.

### III.

#### The State Violated Mr. Baker's Right To A Fair Trial By Committing Prosecutorial Misconduct

##### A. Introduction

Mr. Baker asserts that the prosecutor committed misconduct in his case which requires the vacation of his conviction. During closing argument, defense counsel objected when the State repeatedly presented a still image taken from State's Exhibit 3 during closing argument. Mr. Baker asserts that the video and all images contained therein were admitted only as illustrative exhibits, and the use of these images for other purposes amounted to misconduct. The State's repeated use of one frame of the video in its closing argument not only went beyond the limitations the district court set when it admitted the exhibit, but (when combined with other images and messages in the State's closing presentation) it ultimately communicated to the jury that the video depicted the actual injury.

B. Standard Of Review

Because Mr. Baker's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006). Trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*, 147 Idaho 857, 861 (Ct. App. 2009). For alleged errors for which there was a timely objection, Mr. Baker only has the duty to prove that an error occurred, "at which point the State has the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010).

C. The State Violated Mr. Baker's Right To A Fair Trial By Committing Prosecutorial Misconduct

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion - basic in our law and rightly one of the boasts of a free society - is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall...deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be...deprived of life, liberty or property without due process of law." ID. CONST. art. I, § 13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19, 576 P.2d 1052, 1053 (1978). Prosecutorial

misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005); *Greer v. Miller*, 483 U.S. 756, 765 (1987). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Id.* The hallmark of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial for the accused. *Id.*

Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." *Id.* (quoting *State v. Reynolds*, 120 Idaho 445, 450 (Ct. App. 1991)). "Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Id.* (quoting *State v. Sheahan*, 139 Idaho 267, 280 (2003)). However, considerable latitude has its limits, both in matters expressly stated and those implied. *Id.*

As noted in Issue II, the State was allowed to present a video showing the anatomical structure of the brain, a baby being violently shaken, and the injuries that would result from such an event. (State's Exhibit No.3.) This video was allowed to be admitted as an illustrative exhibit during Dr. Sexton's testimony. (Tr., p.856, L.23 –

p.860, L.14.) The jury was then instructed that, “[t]his illustrative exhibit is not intended to depict any actual injury in this case. The purpose and intent of the illustrative exhibit is simply to illustrate this witness’ testimony that he’s already given.” (Tr., p.876, Ls.15-19.) However, the State did not limit its use of the video to illustrating Dr. Sexton’s testimony. One frame from the video was used repeatedly in the State’s closing argument. This image was taken from the second part of the video and clearly showed an adult’s hand gripping the baby’s chest.<sup>8</sup> Defense counsel objected to the presentation of the image from the illustrative exhibit being used in the PowerPoint presentation. (Tr., p.1563, Ls.5-15.) The district court overruled the objection and noted that the jury had been previously given a limiting instruction regarding the exhibit. (Tr., p.1563, Ls.16-18.)

Ultimately, the State showed this image to the jury 13 times during closing. (State’s Closing and Rebuttal, Closing PowerPoint slides 26-28, 40-46, 48, 52, and 75.) The image was used for multiple purposes, including an attempt to bolster Brian Keim’s credibility. (State’s Closing and Rebuttal, Closing PowerPoint slides 27, 28, and 40.) It was combined with grisly images from the autopsy to support medical testimony. (State’s Closing and Rebuttal, Closing PowerPoint slides 26, 41, 42, 44, 46, 48, 52, and 75.) It was used alongside other brain diagrams and photos of the retinal hemorrhages to explain medical testimony. (State’s Closing and Rebuttal, Closing PowerPoint slides 43 and 45.) And, it was used multiple times in combination with phrases such as “Force

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<sup>8</sup> It appears the frame was pulled from the beginning of the second part of the video (See State’s Exhibit 3, Part II at 00:05 – 00:10.) It should also be noted that there was no evidence and no testimony from any witness that Mr. Baker gripped G.B.’s chest.

& Violence” and a picture of G.B. on life support at the hospital. (State’s Closing and Rebuttal, Closing PowerPoint slides 26, 46, 48, 52, 75.)

This not only perpetuated the video’s appeal to the emotions of the jurors throughout the entire trial, but it clearly communicated to the jury that the video depicted the actual injury in this case. In other words, the image was used as if it were a substantive exhibit. This was a clear violation of the district court’s limited admission of the video and was exactly what the district court’s limiting instruction to the jury was intended to prevent. When issuing the limiting instruction, the district court specifically said that the video was “not intended to depict any actual injury in this case.” (Tr., p.876, Ls.15-16.) However, by combining the frame with images from the autopsy and using it repetitively in a graphic, which connected the “force and violence” that the jury saw in the video to G.B’s death, the State’s conduct undermined the district court’s limiting instruction.

Violation of a district court order governing the presentation of evidence may constitute misconduct. *State v. Field*, 144 Idaho 559, 572 (2007). The Idaho Supreme Court has stated:

We long ago held, “It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury.” *State v. Irwin*, 9 Idaho 35, 44, 71 P. 608, 611 (1903). They should not “exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused.” *Id.*

*State v. Christiansen*, 144 Idaho 463, 469 (2007).

Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the



presence of the jury than they will give to counsel for the accused. *State v. Irwin*, 9 Idaho 35, \_\_\_, 71 P. 608, 610 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence, and the prosecutor should avoid presenting evidence to prejudice the minds of the jury. *Id.* The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*

In the case at hand, the prosecutor's use of the still image from the video was an attempt to circumvent the district court's limiting instruction. Using an image from the video in correlation with the term "force and violence," alongside autopsy photos as well as photos of G.B. on life support, and to explain how Brian Kiem's testimony was supported by the medical evidence, communicated to the jury the exact message that the limiting instruction was intended to eliminate—that the video depicted the actual injury to G.B.

The district court's ruling limiting the purpose for which the video was admitted was clear, and the prosecutor's use of an image from the video during closing argument was misconduct, which amounted to a violation of Mr. Baker's right to due process.

1. The Misconduct Was Not Harmless

The prosecutorial misconduct requires vacation of the conviction because it cannot be said that it did not affect the outcome of the trial. Because there was a timely objection, Mr. Baker only has the duty to prove that an error occurred, and the State bears the burden of proving the error is harmless beyond a reasonable doubt. See *State v. Perry*, 150 Idaho 209, 222 (2010). The State cannot show the error was harmless in this case.

#### IV.

#### Even If The Above Errors Are Individually Harmless, Mr. Baker's Fourteenth Amendment Right To Due Process Of Law Was Violated Because The Accumulation Of Errors Deprived Him Of His Right To A Fair Trial

Mr. Baker asserts that if the Court finds that the above errors were harmless, the district court's errors combined amount to cumulative error. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. *State v. Paciorek*, 137 Idaho 629, 635 (Ct. App. 2002). In order to find cumulative error, this Court must first conclude that there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial. *State v. Lovelass*, 133 Idaho 160, 171 (Ct. App. 1999). Under that doctrine, even when individual errors are deemed harmless, an accumulation of such errors may deprive a defendant of a fair trial. *State v. Martinez*, 125 Idaho 445, 453 (1994). However, a finding of cumulative error must be predicated upon an accumulation of actual errors. *State v. Medina*, 128 Idaho 19, 29 (Ct. App. 1996).

Mr. Baker asserts that the district court's errors in his trial amounted to actual errors depriving him of a fair trial. His arguments in support of this assertion are found in sections I - III above, and need not be repeated, but are incorporated herein by reference.

CONCLUSION

Mr. Baker respectfully requests that his judgment of conviction be vacated and his case remanded for further proceedings.

DATED this 31<sup>st</sup> day of December, 2015.

A handwritten signature in black ink, appearing to read 'E. Allred', written over a horizontal line.

ELIZABETH ANN ALLRED  
Deputy State Appellate Public Defender

A handwritten signature in black ink, appearing to read 'R. P. Anderson', written over a horizontal line.

REED P. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31<sup>st</sup> day of December, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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PATRICK H OWEN  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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